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No. 99-536

Supreme Court, U.S.
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In the Supreme Court of the United States

ROGER REEVES,
Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a court, in determining whether to grant a motion for judgment as a matter of law, should consider all of the evidence put before the jury or only that favoring the non-moving party.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation whose membership consists of 124 major manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. PLAC's primary purpose is to file *amicus* briefs in cases involving issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus* briefs in both state and federal courts, including many in this Court.

This case, which concerns the circumstances in which judgment as a matter of law may be entered pursuant to Fed. R. Civ. P. 50, involves an issue of considerable importance to *amicus* and its members. Petitioner contends that a court considering a motion under Rule 50 may consider only the evidence favoring the non-movant, along with "uncontroverted" evidence offered by "disinterested" witnesses that support the movant, rather than *all* of the evidence actually considered by the jury. If accepted, petitioner's approach would require courts to decide motions under Rule 50 by asking not whether a reasonable jury could decide for the non-movant on the actual record, but whether a jury could do so on a bowdlerized version of the record that has been gerrymandered to bolster the non-movant's case. Because this abridgment of the court's power to grant judgment as a matter of law would make it difficult to disturb patently irrational jury verdicts — and because such an outcome would impose substantial burdens and expense on manufacturers, sellers, and consumers — we submit this brief to assist the Court in the resolution of this case.[1]

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[1] Pursuant to Supreme Court Rule 37.3, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. This brief was funded entirely by *amicus* and was written entirely by its counsel.

SUMMARY OF ARGUMENT

In answering the second question presented in the petition, petitioner takes the position that, in considering a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, a court may *not* take into account all of the evidence actually placed before the jury. Instead, he submits that a reviewing court may consider only (1) evidence that is offered by the non-movant and (2) evidence supporting the movant that is *uncontroverted and offered by a disinterested witness*. This approach — which would require courts to dispose of requests for judgment as a matter of law on the basis of an artificially truncated and highly misleading version of the record — suffers from several fundamental flaws.

First, this Court already has held, in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333 (1933), that courts must consider *all* of the evidence in resolving motions for judgment as a matter of law. That also is the practice in closely analogous areas: courts take all of the evidence into account in passing on motions for summary judgment under Fed. R. Civ. P. 56, and appellate courts do the same in reviewing district court fact-finding under Fed. R. Civ. P. 52(a). There is no justification for a different outcome under Rule 50 — as most of the courts of appeals to consider the issue have concluded.

Second, petitioner is incorrect in contending that, in light of common-law history, the Seventh Amendment precludes a court from considering all of the evidence when it acts on a motion for judgment as a matter of law. In making this argument, petitioner maintains that the 1791 equivalent of such a motion was the demurrer to the evidence, a procedural device that required the moving party to admit all of the non-movant's factual allegations. In fact, however, the common law recognized a variety of mechanisms in addition to the demurrer by which a case could be taken from the jury. And more fundamentally, the confusing and rapidly changing

character of the law in 1791 makes it both impossible and inappropriate to regard the nuances of eighteenth century practice as determinative in setting the limits on judicial oversight of the jury. Instead, the governing Seventh Amendment principle provides that courts may keep juries within the bounds of reason in determining questions of fact — and that principle surely is not violated if judges, in deciding entitlement to judgment as a matter of law, look at all of the evidence actually considered by the jury rather than at an arbitrary subset of that evidence.

Third, petitioner's position makes no sense as a matter of logic. If the proverbial forty bishops testify in favor of the party moving for judgment as a matter of law, it would be absurd for a court to disregard that evidence simply because the non-movant "controverts" it with wholly incredible testimony of his own. At the same time, it makes equally little sense to ignore incontrovertible evidence simply because it is offered by an "interested" witness. And petitioner is simply wrong in asserting that courts necessarily will balance or weigh the evidence if they consider the entire record when assessing entitlement to judgment as a matter of law. In conducting an inquiry under Rule 50, it is settled that the court must view the evidence in the light most favorable to (and must draw all inferences in favor of) the non-moving party — and the court must then answer the *legal* question whether any reasonable jury could rule for the non-movant on that view of the evidence. There is no room in this inquiry for weighing the evidence or determining the credibility of witnesses.

ARGUMENT

COURTS MUST CONSIDER ALL OF THE EVIDENCE, NOT ONLY THAT OF THE NON-MOVANT, IN DETERMINING WHETHER TO GRANT JUDGMENT AS A MATTER OF LAW PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 50

Petitioner's brief reveals that there is a substantial area of common ground between the parties in this case on the second question presented in the petition for certiorari. That question asks whether a court considering a motion for judgment as a matter of law "should weigh all of the evidence or consider only the evidence favoring the nonmoving party" (Pet. i); the petition appeared to contend that only the non-movant's evidence could be considered. See *id.* at 8-9. In his brief, however, petitioner has abandoned that position, acknowledging that, in addition to evidence presented by the non-movant, a court may take into account "any uncontradicted and unimpeached evidence from disinterested witnesses produced by movant." Pet. Br. 35. But this concession does not go far enough. In our view, this Court's precedent, the relevant history, and the dictates of logic point toward a single conclusion: in determining entitlement to judgment as a matter of law, a court must consider *all* of the evidence in the case.

A. It Is Settled That The Seventh Amendment Permits Substantial Judicial Oversight Of The Jury

At the outset, it is useful to review aspects of the issue here that are not in dispute. *First*, although petitioner and its *amicus* Association of Trial Lawyers of America ("ATLA") contend that juries should be given the freest possible reign, it must be remembered that the common law *always* has made use of mechanisms to restrain juror discretion. Prior to the mid-seventeenth century, members of the jury functioned as

witnesses as well as triers of fact; they were to reach a verdict on the basis of their personal knowledge of the events at issue. See 1 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 333-334 (7th ed. 1956); Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 203-205 (1988). Formal judicial review of verdicts returned by such juries was logically impossible because the jurors were expected to consider information not available to the judge.

Instead, courts relied to some degree on informal controls (such as telling a jury how to decide a case or requiring it to redeliberate when its verdict seemed suspect) and on fining juries that reached verdicts against the weight of the evidence. See Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 211 & nn. 62-63; Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285-298 (1978). But during this period control of juries was principally exercised through the attaint, which involved the convening of a 24-man jury that, when a doubtful verdict had been returned, would try the first jury for perjury. "This was only logical at a time when every jury spoke out of its own knowledge of the facts involved in the case. * * * If such jurymen returned a verdict which was demonstrably false, and in spite of their own better knowledge of the facts, then it was obvious that they had committed perjury and deserved the punishment provided for attainted juries" — imprisonment, confiscation of goods, and a declaration that "'they themselves forever thenceforward be esteemed in the eye of the law infamous.'" T.F.T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW 131 (5th ed. 1956) (citation omitted). See Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 209-210. This cumbersome institution never worked well, however (in part because attaint juries themselves proved unreliable), and attaint fell into disfavor by the beginning of the seventeenth century, a time when petit jurors had ceased to function as witnesses. See Plucknett, *supra*, at 132-134; Mitnick, *supra*, 32 AM. J. LEGAL HIST. at

205-212. It was "[i]n response to the crisis of jury control caused by the decline of the attaint and the prohibition against fining [recalcitrant jurors], [that] the judges turned to the new trial as a remedy for an erroneous verdict in civil cases." *Id.* at 211-212 (citation omitted). See Plucknett, *supra*, at 135-136.

Second, as this history suggests, with the abandonment of the attaint the device of granting new trials "came into common use in England" (Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 681 (1918)) and "[a] new trial would be liberally granted on the motion of a dissatisfied litigant." Langbein, *Introduction to Book III*, in III W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago facsimile ed. 1979), at vii. As long ago as the mid-seventeenth century English courts granted new trials in cases where juries returned verdicts against the weight of the evidence,[2] and the practice was settled in all English courts by the mid-eighteenth century.[3] There is no doubt that judges considered *all* of the evidence in determining entitlement to a new trial. See, *e.g.*, W. Blackstone, *supra*, at 387 (new trial if "the jury have brought

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[2] See, *e.g.*, *Wood* v. *Gunston*, 82 Eng. Rep. 864, 867 (Upper Bench 1655); *Anon.*, 83 Eng. Rep. 775 (K.B. 1661); *Anon.*, 83 Eng. Rep. 1288 (K.B. 1665); *Duke of Richmond* v. *Wise*, 86 Eng. Rep. 86 (K.B. 1671). See generally 1 Holdsworth, *supra*, at 346.

[3] See, *e.g.*, *R.* v. *Bewdley*, 24 Eng. Rep. 357, 359 (K.B. 1712); *Musgrave* v. *Nevinson*, 93 Eng. Rep. 715 (K.B. 1723); *Dormer* v. *Parkhurst*, 95 Eng. Rep. 414, 418 (K.B. 1738); *Berks* v. *Mason*, 96 Eng. Rep. 874, 874-875 (K.B. 1756); *Bright* v. *Eynon*, 97 Eng. Rep. 365, 366, 368 (K.B. 1757); *Norris* v. *Freeman*, 95 Eng. Rep. 921 (C.P. 1769). See generally T.F.T. Plucknett, *supra*, at 136 ("the work [of authorizing the order of new trials] was half done by 1700, and declared to be complete in 1757" in *Bright*); Mitnick, *supra*, 32 AM. J. LEGAL HIST. at 208-216.

in a verdict without or contrary to evidence, so that [the judge] is reasonably dissatisfied therewith"). See also *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996) (citation omitted; bracketed material added by the Court) (trial judge has "'discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence'"); Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 311 (1966).

Third, it is of course settled that a district court may enter — and a court of appeals may direct entry of — judgment as a matter of law "in a situation where the * * * evidence [is] insufficient to support a finding of liability." *Hetzel* v. *Prince William County*, 523 U.S. 208, ___, 118 S. Ct. 1210, 1211 (1998). See *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) ("there is no constitutional bar to an appellate court granting judgment *n.o.v.*"); *Galloway* v. *United States*, 319 U.S. 372, 389-390 (1943) (affirming long-settled power of trial courts to direct verdicts). Cf. *Gasperini*, 518 U.S. at 435-436 (approving appellate review of trial court's denial of motion to set aside jury verdict as excessive). And there is no dispute about the test that governs disposition of such a motion: as the United States and EEOC explain in their brief (at 22), judgment as a matter of law must be entered when "no reasonable jury" could decide against the movant. The federal courts thus "do not follow the rule that a scintilla of evidence is enough to create an issue for the jury." C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2524, at 253 (2d ed. 1994). Instead, while the court must leave it to the jury to resolve material conflicts in the evidence, judgment will be entered (and a jury verdict set aside) when "no reasonable jury could find [against the movant] * * * on the basis of the evidence presented." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 514 (1988). See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); C. Wright & A. Miller, *supra*, § 2524, at 262-263.

B. This Court's Precedent Establishes That Judges Must Consider All Of The Evidence In Ruling On A Motion For Judgment As A Matter Of Law

Against this background, the question now before the Court is whether, in applying this reasonable juror standard, the district or appellate judge is to consider all, or only a subset, of the evidence presented to the jury. Yet that is a question this Court already has answered: in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333 (1933), the Court expressly considered *all* of the evidence in holding that the district court properly directed a verdict for the defendant. The Court there explained that, "where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.'" *Id.* at 343 (citation omitted). In *Chamberlain* itself, a case in which the plaintiff sought compensation for injury under the Federal Employers Liability Act, the Court concluded that "no verdict based upon" the plaintiff's version of the accident

> could be sustained as against the positive testimony to the contrary of unimpeached witnesses, all in a position to see, as [plaintiff's] witness was not, the [accident]. * * * The fact that these witnesses were employees of the [defendant], under the circumstances here disclosed, does not impair this conclusion.

Id. at 342-343. See also *Southern Ry. Co.* v. *Walters*, 284 U.S. 190, 194 (1931) (considering evidence of both parties); *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U.S. 209, 216 (1931) ("We recognize the general rule, * * * that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."). In addition, more recent opinions also "strongly suggest that the Court is in fact willing to

consider all of the evidence in the record in passing on a directed verdict issue." Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 949 (1971) (citing, *e.g.*, *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 277 (1968)).

This conclusion is confirmed by practice in analogous areas. The United States and the EEOC (at Br. 22-23 & n.6) thus agree that a court addressing a motion for judgment as a matter of law "must review all of the evidence," noting that judges consider "all of the evidence in passing on a motion for summary judgment under Federal Rule of Civil Procedure 56." See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). See also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. at 251-252 ("[i]n essence, * * * the inquiry under [Rules 50 and 56] is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"). In addition, as the United States and EEOC also observe, appellate courts take into account all of the evidence in reviewing district court fact-finding under Fed. R. Civ. P. 52(a) (see *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985)), and all courts do the same when they consider motions for judgment of acquittal under Fed. R. Crim. P. 29 (see *Lockhart* v. *Nelson*, 488 U.S. 33, 41-42 (1988)). There is no justification for a different outcome under Fed. R. Civ. P. 50.

In arguing to the contrary, petitioner (at Br. 36-37) relies principally on *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949), where the Court — without citation to any authority at all — declared it "the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury, we need look only to the evidence and reasonable inferences which tend to support the case of the litigant against whom a peremptory instruction has been given." But this passage cannot bear the weight that petitioner would place upon it. For one thing, the opinion in *Wilkerson* is

more ambiguous than petitioner's passage suggests; elsewhere in the opinion the Court did address the movant's testimony, while noting the "conflict in the evidence." *Id.* at 59-60. For another, *Wilkerson* arose in the Utah state courts and the Court's opinion therefore did not address the Seventh Amendment at all. In contrast, Justice Frankfurter's concurring opinion, which discussed the Seventh Amendment and analogous state constitutional provisions, concluded that "it is the trial judge's function to determine whether the evidence *in its entirety* would rationally support a verdict." *Id.* at 65 (Frankfurter, J., concurring) (emphasis added).

Finally, commentators have been unanimous in noting that "the statement in *Wilkerson* was quite unnecessary to the result. On the disputed factual question [in the case], there was testimony of approximately equal weight on each side; on *any* test, a jury could reasonably have found either way." Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 73 (1977) (emphasis added). See Cooper, *supra*, 55 MINN. L. REV. at 948-949; C. Wright & A. Miller, *supra*, § 2529, at 297-300. And the conclusion that *Wilkerson*'s statement did not constitute a considered holding is supported by the fact that "[j]ust a few years before, the Court had explicitly considered evidence favoring the moving party in *Pennsylvania Railroad v. Chamberlain*." Currie, *supra*, 45 U. CHI. L. REV. at 73.[4] The United States and EEOC therefore surely are correct when they observe (at Br. 23 n.6) that "[r]ead in context, *

[4] Indeed, Justice Black, author of the Court's opinion in *Wilkerson* (and perhaps the Member of the Court who was most enthusiastic about an expansive reading of the Seventh Amendment) was of the view that a directed verdict should be granted when "there is in the evidence, no room whatever for honest difference of opinion over the factual issue in controversy." *Galloway*, 319 U.S. at 407 (Black, J., dissenting). He did not suggest that only the non-movant's evidence was relevant to this inquiry.

* * the language in *Wilkerson* means only that a court should not give weight to evidence that is contradicted either directly or inferentially by the non-moving party's evidence."

In addition, "it seems highly significant that statements can be found in virtually all of the federal courts of appeals that 'all' of the evidence must be considered, albeit in the light most favorable to the party opposing the motion [for judgment as a matter of law]." Cooper, *supra*, 55 MINN. L. REV. at 951. See Schnapper, *Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 295-296 ("The general practice of the appellate courts today is to insist that the correctness of a challenged jury verdict is to be assessed by considering 'all' the evidence. * * * As a consequence of this approach, appellate panels routinely rely on the evidence of the losing party in overturning jury verdicts."). And while "[t]here are, because of *Wilkerson*, contrary statements in some of these courts," "in many of the cases * * * these contrary statements seem to have had as little bearing on the result as in *Wilkerson* itself, and in some of them it is transparent that the court then went on to consider all of the evidence." Cooper, *supra*, 55 MINN. L. REV. at 951-952 (footnote omitted; citing cases).[5] Precedent therefore establishes that courts must consider the entirety of the evidence when considering motions for judgment as a matter of law.

C. Consideration Of All Of The Evidence Is Consistent With Common Law Practice

Petitioner nevertheless asserts that common-law history precludes a court from considering all of the evidence when

[5] These aberrant statements may account for Justice White's conclusion, in a dissent from denial of certiorari, that the courts of appeals are divided on this question. *Venture Technology, Inc.* v. *Nat'l Fuel Gas Distribution Corp.*, 459 U.S. 1007, 1009 (1982) (White, J., dissenting).

it acts on a motion for judgment as a matter of law. In petitioner's view, the 1791 common law equivalent of such a motion was the demurrer to the evidence. Because that procedural device required the moving party to admit all of the non-movant's factual allegations,[6] petitioner continues, historical practice at the time of the adoption of the Seventh Amendment means that it is appropriate today to consider only the non-movant's evidence when addressing a modern motion for judgment as a matter of law. Pet. Br. 36-37. This contention, however, misunderstands both the relevant history and this Court's approach to the Seventh Amendment.

At the outset, English common law in the late eighteenth century recognized a number of mechanisms in addition to the demurrer by which a case could be taken from the jury.[7]

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[6] The party demurring to the evidence would essentially stipulate to the truth of his opponent's evidence and ask the court to determine whether that evidence failed to make out a case as a matter of law. By doing so, the movant forfeited any opportunity to submit evidence of his own; if the opponent's evidence was *not* found deficient as a matter of law, the court would issue judgment in the opponent's favor and the case would not go to the jury. Needless to say, this consequence made the demurrer a very risky proposition. See Cooper, *supra*, 55 MINN. L. REV. at 911; Scott, *supra*, 31 HARV. L. REV. at 683; Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 561-562 (1950). The demurrer's "harsh doctrine * * * probably resulted from the procedural policy underlying the entire structure of common law pleadings: namely, that every case should be reduced to a single issue either of law or of fact and then determined upon the basis of that issue." King, *Trial Practice — Demurrers Upon Evidence as a Device for Taking a Case From the Jury*, 44 Mich. L. Rev. 468, 470.

[7] The Court has indicated that the relevant common law for Seventh Amendment purposes is that of England. See *Gasperini*, 518 U.S. at 452 (Scalia, J., dissenting); *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 8 (1899).

Indeed, there "exist[ed] in 1791 a practice of 'directing' juries as to the verdict which should be returned." Cooper, *supra*, 55 MINN. L. REV. at 910. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 350 n.15 (1979) (Rehnquist, J., dissenting); *Galloway*, 319 U.S. at 392 n.23; Blume, *supra*, 48 MICH. L. REV. at 560. While this procedure was not a precise parallel to the modern directed verdict, it nevertheless was "commonplace" in late eighteenth century England for courts "to instruct the jury 'that the plaintiff was entitled to recover,' or 'the plaintiff must have a verdict.'" Henderson, *supra*, 80 HARV. L. REV. at 302 (citations omitted) (citing cases). It appears "that [the jury] was bound to obey [such instructions] (as it nearly always did in ordinary civil cases)." *Ibid.* As a consequence, it seems "that as early as 1755 the legal profession considered that a judge could take the case away from the jury by such peremptory instructions." *Id.* at 303. And "[s]ince obedience [to such instructions on the jury's part] was expected and ordinarily must have followed, thereby finally terminating the case, the device is of course something considerably more potent than simply waiting for the jury's verdict and then setting it aside if against the court's views." Cooper, *supra*, 55 MINN. L. REV. at 910. In addition, English law at the close of the eighteenth century apparently was beginning to recognize a primitive version of the judgment notwithstanding the verdict. See Henderson, *supra*, 80 HARV. L. REV. at 316 (citing cases). It therefore cannot be said, as petitioner would have it, that a case could be taken from the jury only through use of the demurrer.

But there is a more fundamental problem with petitioner's effort to identify the demurrer as the specific eighteenth century procedure that corresponded to (and therefore that limits) modern directed verdict practice: the law of the time was in a state of considerable ferment and uncertainty. As

the Court explained at some length in *Galloway*, the leading decision on directed verdict practice:

> Nor were the "rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. * * * And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.

319 U.S. at 392 (footnotes omitted).

In this setting, "[t]he basic historic difficulty posed by directed verdict practices is that there had not emerged, by 1791, either the detail or more than the approximate substance of a parallel method of judicial control." Cooper, *supra*, 55 MINN. L. REV. at 909. After all, the notion that jurors were not to decide cases on the basis of their personal knowledge of the facts had developed episodically and was still relatively new. For this reason,

> "the methods of controlling the jury grew up in a haphazard sort of way. Most of them grew up at a time when the jurors still had a right to decide upon their own knowledge, as well as upon the evidence, a right which in the eighteenth century became obsolete." This pattern of growth by itself suggests that 1791 practices should not be adopted as setting the final definitions of the methods and extent of judicial control.

Id. at 910 (quoting Scott, *supra*, 31 HARV. L. REV. at 678) (footnote omitted). Indeed, by 1791 the demurrer itself was

"already antiquated," and it fell into disuse before the end of the decade. King, *supra*, 44 MICH. L. REV. at 473. See Henderson, *supra*, 80 HARV. L. REV. at 305. In light of that development, it would be peculiar indeed to make the demurrer the benchmark for all of modern directed verdict practice.[8]

Against this background, it is not surprising that the history of the Seventh Amendment reveals that its framers paid virtually no attention to the details of contemporary directed verdict practice. The most comprehensive review of the Amendment's development concluded that

> [n]owhere in the history of the Philadelphia Convention, the ratifying conventions of the several states, or the specific "legislative history" of the Bill of Rights can any evidence be found that the relation of judge to jury was considered as affected in any but the most general possible way by the seventh amendment, or even that it was considered at all.

Henderson, *supra*, 80 HARV. L. REV. at 290. While "a general guarantee of the civil jury as an institution was widely desired, * * * there was no consensus on the precise extent of its power. On the contrary, no one discussed that question in any detail." *Id.* at 299. See Cooper, *supra*, 55 MINN. L. REV. at 908. Thus, "[i]n in the last analysis there is really very little in the historical materials that can provide helpful

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[8] The "plastic and developing character of these procedural devices during the eighteenth and nineteenth centuries" (*Galloway*, 319 U.S. at 392 n.23) presents in particularly acute form a problem identified by Justice Brennan: the relevant eighteenth century English practices are "so remote in form and concept that there is no firm basis for comparison. In such cases the result is less the discovery of a historical analog than the manufacture of a historical fiction." *Chauffeurs, Teamsters & Helpers, Local No. 391* v. *Terry*, 494 U.S. 558, 578 n.7 (1990) (opinion of Brennan, J.).

specific guidance" on the particular incidents of the jury trial that were viewed as desirable by the framers of the Amendment; "[r]esistance on the part of federalists to the basic idea of a national bill of rights was too general to permit the introduction of matters of such relatively trivial significance as * * * the precise line that should delineate the provinces of jury and judge." Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 710, 724-725 (1973).

For these reasons, the Court has never regarded the nuances of eighteenth century practice as determinative in setting the limits on judicial oversight of the jury. Instead, the Court has held repeatedly that

> "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." * * * "The more logical conclusion, we think, and the one which both history and the previous decisions here suggest, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

Parklane Hosiery, 439 U.S. at 336-337 (quoting *Galloway*, 319 U.S. at 390, 392). See *Gasperini*, 518 U.S. at 445 (Stevens, J., dissenting); *Colgrove* v. *Battin*, 413 U.S. 149, 157 n.11 (1973); Henderson, *supra*, 80 HARV. L. REV. at 336. As Professor Scott put it some eighty years ago, "[t]he common-law practice described so painstakingly by the learned Mr. Tidd surely did not bodily become a part of the organic law of the United States." Scott, *supra*, 31 HARV. L. REV. at 670.

Under the Court's approach, developments in trial and post-verdict practice accordingly "are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791." *Parklane Hosiery*, 439 U.S. at 337. "On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment" (*id.* at 336) — devices that include the modern directed verdict and motion for judgment as a matter of law. See *ibid.*; *Gasperini*, 518 U.S. at 436 & n.20. So long as these practices preserve "'the substance of the common-law right of jury trial,'" they are "[c]onsistent[] with the historical objective of the Seventh Amendment"; this principle permits the use of "'new devices * * * to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.'" *Colgrove*, 413 U.S. at 156-157 (citations omitted).[9]

This understanding makes plain that, so far as Rule 50 and the precise question presented here are concerned, "there are no rigidly definite directed verdict standards to be found in the Constitution; a general policy of respect [for the jury] is about the most that can be developed with any secure foundation." Cooper, *supra*, 55 MINN. L. REV. at 904. In fact, "[t]he majority decision in *Galloway* * * * decisively rejected the thesis that the boundaries of the obsolete demurrer to the evidence confine the directed verdict of today." Currie, *supra*, 45 U. CHI. L. REV. at 75. See

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[9] As Professor Wolfram has explained, this approach is wholly consistent with the intent of the Seventh Amendment's drafters. "The most appealing view of the political settlement achieved by the seventh amendment is the version suggested by the argument that the term 'common law' in the seventh amendment was probably intended to refer to a process of legal development, rather than to an immutable and changeless state of the law." Wolfram, 57 MINN. L. REV. at 744.

Galloway, 319 U.S. at 392 ("It may be doubted that the [Seventh] Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered.").[10] Instead, "'preserv[ing] the basic institution of jury trial in its most fundamental elements'" (*Parklane Hosiery*, 439 U.S. at 336-337 (citation omitted)) requires recognition "that the constitutional province of the jury in civil cases is simply the determination of questions of fact in issue as to which reasonable men may reach different results; that the constitutional guaranty is not violated by the exercise of control by the court * * * in keeping [the jury] within the bounds of reason in determining questions of fact." Scott, *supra*, 31 HARV. L. REV. at 678. And in determining whether a reasonable juror could reach a particular result, it surely does not invade the jury's province for a court to consider all of the evidence actually considered by the jury, rather than an arbitrary subset of that evidence.

D. Disregarding A Portion Of The Evidence Considered By The Jury Would Lead To Bizarre And Unjustified Results

The historical deficiencies in petitioner's position are matched by his arguments's logical defects. He would permit a court that is reviewing a motion for judgment as a matter of law to consider only the non-movant's evidence, along with evidence supporting the movant that is uncontroverted, unimpeached, and offered by "disinterested" witnesses. Pet.

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[10] Actually, even the approaches propounded by petitioner and by ATLA depart from the demurrer, which required that "challenge to an opponent's case be made * * * at the price of all opportunity to have [the challenger's] case considered." *Galloway*, 319 U.S. at 392. Petitioner and ATLA do not suggest that a party who seeks judgment as a matter of law must forfeit any opportunity to present evidence at trial, although that is the logical consequence of their position.

Br. 35.[11] But among its many bizarre results, this approach, as Professor Currie has noted, would mean that even in the face of the proverbial "testimony of forty bishops" offered in support of the moving party, "the converse testimony of the [party opposing the motion] would preclude a directed verdict." Currie, *supra*, 45 U. CHI. L. REV. at 73. And "[i]t is, to put it gently, difficult to reconcile such results either with the rule that juries may not act unreasonably or with the underlying policy of preventing juries from undermining the law." *Ibid*. After all, "[e]vidence which considered alone may be thought substantial, may become insubstantial when the full light of all the evidence is thrown upon the scene." Blume, *supra*, 48 MICH. L. REV. at 579.

One obvious problem with the contention that all controverted testimony must be disregarded is the reality that some controverting testimony may be literally incredible. In fact, "[r]ulings that testimony which would be sufficient standing alone cannot be accepted because contrary to physical facts, even those established by other testimony rather than immutable physical law, are such familiar examples of considering evidence unfavorable to the party opposing the motion as to require no more than marginal comment." Cooper, *supra*, 55 MINN. L. REV. at 951.[12] See

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[11] It is easy to understand why petitioner has abandoned the argument that only the non-movant's testimony may be considered: "it would be absurd to apply literally a rule requiring consideration of only the parts of the evidence favorable to the party opposing a directed verdict motion." Cooper, *supra*, 55 MINN. L. REV. at 952. See *id*. at 950-952 (citing suitably absurd examples).

[12] Professor Cooper's marginal comment noted that "[o]ne of the most frequent applications of the 'physical facts' rule which does not rest on testimony beyond that of the witness is found in the common rule that testimony that the witness stopped and looked, saw there was nothing coming, and then immediately got hit by a train cannot be accepted." 55 MINN. L. REV. at 951 n.153.

C. Wright & A. Miller, *supra*, § 2527, at 285 ("it is well settled that no weight is to be given to testimony that is opposed to the laws of nature or undisputed physical facts"). Similarly, the non-movant's testimony may lack all weight because it is internally inconsistent. See, *e.g.*, *Galloway*, 319 U.S. at 385 n.11. And it makes no sense at all for a court to disregard otherwise unimpeachable evidence supporting the movant (that offered by the forty bishops, for example), simply because the non-movant generates insubstantial contrary evidence to controvert it.

At the same time, petitioner also offers no justification for a rule that would permit consideration only of evidence offered by the movant's "disinterested" witnesses.[13] In fact, this Court already has rejected such an approach, expressly taking into account the testimony of a defendant's employees in holding that a directed verdict was properly granted. See *Chamberlain*, 288 U.S. at 338-339, 342-343; *Chesapeake & Ohio Ry*, 283 U.S. at 261. That is only logical. While there often may be cases where the testimony of interested persons is entitled to little weight, it is easy to imagine circumstances where such testimony is wholly incontrovertible. And "[a] layman would think it strange to see a judge wearing blinders to keep himself from seeing more than a part of the truth reflected by the evidence in a case." Blume, *supra*, 48 MICH. L. REV. at 581.

At bottom, petitioner's contention is premised on the notion that, if courts consider all of the evidence in addressing a motion for judgment as a matter of law, they

[13] It is not entirely clear even how to apply such a test. That witnesses are willing to appear for the movant at all suggests that they are not wholly disinterested. And the manifold gradations of relationship that may exist between a party and its witnesses would appear to make application of petitioner's rule a practical impossibility.

inevitably will engage in "balancing" of the evidence, will assess the credibility of witnesses, and will end by invading the province of the jury. Pet. Br. 38-40. In our view, however, this line of argument rests on a basic misunderstanding of the inquiry conducted by courts under Rule 50. It is settled that, in such an inquiry, the evidence must be viewed in the light most favorable to (and all reasonable inferences from the evidence must be drawn in favor of) the non-moving party. See *Galloway*, 319 U.S. at 395; *Gasperini*, 518 U.S. at 443 (Stevens, J., dissenting). No one suggests that courts may weigh or balance the evidence; when there is a material "conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side." *Chamberlain*, 288 U.S. at 338. And there is no question of the court's making credibility determinations, because all testimony in support of the non-movant that reasonably could be believed is presumed to *have* been believed by the jury. Instead, what the court must do is determine whether any *reasonable* jury could find against the movant on the basis of the evidence in the case — a determination that remains legal rather than factual in nature even when the evidence considered is that of both parties.[14]

This is a point established by cases considering motions for summary judgment under Rule 56 — authority that petitioner acknowledges is fully applicable here. Pet. Br. 39-40. As we have noted, under that Rule courts consider *all* of the evidence of *both* parties, and will grant the motion when the non-movant's evidence is so insubstantial that it could not

[14] Of course, in making this determination courts must disregard evidence that should not have been placed before the jury at all, such as expert opinion that does not comport with the requirements of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This point is explored in greater detail in PLAC's *amicus* brief in *Weisgram* v. *Marley Company*, No. 99-161.

reasonably support judgment in that party's favor. "[A] court pondering a Rule 56 motion need not embrace inferences that are wildly improbable or that rely on 'tenuous insinuation'" (*National Amusements, Inc.* v. *Town of Dedham*, 43 F.3d 731, 743 (1st Cir.), cert. denied, 515 U.S. 1103 (1995) (citation omitted)). Courts thus agree that

> Federal Rule of Civil Procedure 56 empowers a court to make a threshold determination of whether a factual issue is "genuine." * * * Not every alleged factual conflict creates a "genuine" issue of material fact. As the Supreme Court points out, if the evidence creating the alleged factual conflict is "merely colorable, or is not sufficiently probative, summary judgment may be granted."

Unterreiner v. *Volkswagen of America, Inc.*, 8 F.3d 1206, 1212 (7th Cir. 1993) (quoting *Anderson* v. *Liberty Lobby*, 477 U.S. at 249-250). See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (expert report that is "implausible and inconsistent with record evidence" cannot defeat summary judgment); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

Under both Rule 50 and Rule 56, "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway*, 319 U.S. at 395. The reason for this requirement is plain: "[t]o permit a jury to find the facts contrary to overwhelming evidence, or upon wholly insufficient evidence, would license juries to undermine the law." Currie, *supra*, 45 U. CHI. L. REV. at 72. And as Judge Learned Hand wrote for the Second Circuit, in a case

where the court considered the evidence of both parties, "[t]he most that has been said — probably all that can be — is that there comes a point where the evidence no longer justifies any verdict but one." *Pennsylvania R.R..Co.* v. *Chamberlain*, 59 F.2d 986, 987 (2d Cir. 1932), rev'd on other grounds, 288 U.S. 333 (1933). In such circumstances, it does not invade the jury's province for the court to direct entry of judgment as a matter of law.[15]

For similar reasons, petitioner also is wrong in contending (at Br. 41-49) that a court of appeals must defer to the district court's judgment when reviewing a ruling on a Rule 50 motion. Because *both* district and appellate courts must view the evidence in the light most favorable to the non-movant, and because *neither* court may make credibility determinations in considering the motion, the role of the two courts is identical: it is to make the *legal* determination whether "the evidence presented in the * * * trial * * * would not suffice, *as a matter of law*, to support a jury verdict." *Boyle*, 487 U.S. at 513 (emphasis added). See *Neely*, 386 U.S. at 327 (question of evidentiary sufficiency to support a verdict raises "issues of law with which the courts of appeals regularly and characteristically must deal"). Needless to say, this "is solely a question of law." C. Wright & A. Miller, *supra*, § 2524, at 249 (citing cases). As a consequence, the district and appellate courts are identically situated to resolve this question, and "[t]he analysis is the same in the trial court and on appeal." *Id.* § 2524, at 251.

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[15] The court below thus applied the proper standard when it considered all of the evidence in determining respondent's entitlement to judgment as a matter of law. That is all this Court need decide to resolve the second question presented in the petition; the purely factual challenge made by petitioner and the United States to the court of appeals' assessment of that evidence was not presented in the petition for certiorari and should not be addressed by the Court.

The Court thus explained in *Neely* that the district court has "no special advantage or competence in dealing with" the issue. 386 U.S. at 327. The courts of appeals accordingly are unanimous in holding that appellate courts "review[] the district court's grant or denial of a renewed motion for judgment as a matter of law *de novo*. * * * The reviewing court's role is the same as that of the district court." *Lambert* v. *Ackerley*, 156 F.3d 1018, 1020 (9th Cir. 1998), cert. denied, 68 U.S.L.W. 3459 (Jan. 18, 2000).[16] That conclusion plainly is correct.[17]

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[16] See, *e.g.*, *Kramer* v. *Logan County School Dist. No. R-1*, 157 F.3d 620 (8th Cir. 1998); *Myers* v. *County of Orange*, 157 F.3d 66, 73 (2d Cir. 1998), cert. denied, 119 S. Ct. 1042 (1999); *Tronzo* v. *Biomet, Inc.*, 156 F.3d 1154, 1157 (Fed. Cir. 1998); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 592 (5th Cir. 1998); *Webb* v. *ABF Freight System, Inc.*, 155 F.3d 1230, 1238 (10th Cir. 1998), cert. denied, 119 S. Ct. 1253 (1999); *Failla* v. *City of Passaic*, 146 F.3d 149, 153 (3d Cir. 1998); *Criado* v. *IBM Corp.*, 145 F.3d 437, 448 (1st Cir. 1998); *Brickers* v. *Cleveland Board of Education*, 145 F.3d 846, 849 (6th Cir. 1998); *Stenograph L.L.C.* v. *Bossard Assocs., Inc.*, 144 F.3d 96, 99 (D.C. Cir. 1998).

[17] In arguing to the contrary, petitioner contends that appellate review of a district court's decision under Rule 50 must be especially deferential because jury fact-findings were not subject to appellate review at common law. Pet. Br. 41-42. But this Court already has rejected petitioner's premise, holding that "there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently there is no constitutional bar to an appellate court granting judgment *n.o.v.*" *Neely*, 386 U.S. at 321.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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